

OCT 25 2000

RECEIVED
FEDERAL ELECTION
COMMISSION

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20363

2000 OCT 25 P 40

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MURS: 4956, 4962 and 4963
DATES COMPLAINTS FILED:
1/3/00, 1/18/00, and 1/18/00
DATES OF NOTIFICATIONS:
1/10/00, 1/27/00 and 1/27/00
DATE ACTIVATED: 3/17/00

STAFF: Anne A. Weissenborn

COMPLAINANT: LaRouche's Committee for a New Bretton Woods

RESPONDENTS: MURs 4956, 4962 and 4963
Gore 2000, Inc., and Jose Villarreal, a treasurer
Bill Bradley for President, Inc., and Theodore V.
Wells, Jr., as treasurer

MUR 4956 Manchester Union Leader
New Hampshire Public Television
New England Cable News

MUR 4962 WMUR-TV, Manchester, NH
Cable Network News

MUR 4963 Los Angeles Times
Cable Network News

RELEVANT STATUTES: 2 U.S.C. § 441b
11 C.F.R. § 100.7(b)(2)
11 C.F.R. § 100.8(b)(2)
11 C.F.R. § 110.13
11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED: LaRouche's Committee for a New Bretton Woods

FEDERAL AGENCIES CHECKED: None

21 OCT 2000 3:03

I. ACTIONS RECOMMENDED

The Office of the General Counsel recommends that the Commission find no reason to believe in MUR 4956 that the Union Leader Corporation, New Hampshire Public Television, and New England Cable News violated 2 U.S.C. § 441b, no reason to believe in MUR 4962 that WMUR-TV and Cable News Network violated 2 U.S.C. § 441b, and no reason to believe in MUR 4963 that the Los Angeles Times and Cable News Network violated 2 U.S.C. § 441b. This Office also recommends in all three of these matters that the Commission find no reason to believe that Gore 2000, Inc., and Jose Villarreal, as treasurer, and Bill Bradley for President, Inc., and Theodore V. Wells, Jr., as treasurer, violated 2 U.S.C. § 441b.

II. GENERATION OF MATTERS

Each of the three enforcement matters addressed in this First General Counsel's Report was generated by a complaint filed by LaRouche's Committee for a New Bretton Woods ("the LaRouche Committee"). Each of the complaints, received by the Commission on January 3, January 18 and January 18, 2000, respectively, alleges that the named co-sponsors of televised debates among candidates for nomination to the Office of President violated regulations issued by the Federal Election Commission ("the Commission"), and thus the Federal Election Campaign Act of 1971, as amended, ("the Act"), by excluding Lyndon LaRouche from a debate involving Democratic presidential candidates. Each of the respondent media companies was notified of the complaint in which it is named, as were Gore 2000, Inc., and its treasurer, and

21.04.403.3034

Bill Bradley for President, Inc., and its treasurer. All of the respondents except the Los Angeles Times have filed responses to the complaint(s) in which they are named.

III. FACTUAL AND LEGAL ANALYSIS

A. The Law

The Act prohibits any corporation from making contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b(a). 2 U.S.C. § 441b(b)(2) and 11 C.F.R. § 114.1(a) define "contribution or expenditure" to include "any direct or indirect payment, distribution, loan . . . or any services, or anything of value . . . to any candidate [or] campaign committee, . . . in connection with" any election to Federal office. *See also* 2 U.S.C. § 431(8)(A)(i) and § 431(9)(A)(i), and also 11 C.F.R. § 100.7(a)(1) and § 100.8(a)(1). "Anything of value" is defined to include in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii)(A).

2 U.S.C. § 431(9)(B)(i) exempts from the definition of "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate"

11 C.F.R. § 100.7(b)(2) and § 100.8(b)(2) exempt from the definitions of both "contribution" and "expenditure" costs "incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate" When addressing this "press exemption" in advisory opinions, the

P.1.014.402.3085

Commission has stressed that certain factors must be present in order for a candidate-related media activity, such as a candidate appearance, to fall within this exemption:

(1) the entity undertaking the activity must be a press entity; (2) the entity cannot be owned by a candidate or political party; and (3) the entity must be acting as a press entity when undertaking the activity. Advisory Opinion 1996-16, Advisory Opinion 1996-41, citing The Reader's Digest Association, Inc. v. FEC, 509 F. Supp. 1210 (S.D.N.Y. 1981).¹

The Commission's regulations exempt from the definitions of "contribution" and "expenditure" funds provided or used "to defray costs incurred in staging candidate debates in accordance with the provisions of 11 C.F.R. § 110.13 and 114.4(f)." 11 C.F.R. § 100.7(b)(21) and § 100.8(b)(23). (Emphasis added.) 11 C.F.R. § 114.4(f) specifically permits broadcasters, newspapers, magazines and other periodical publications to use corporate funds to stage candidate debates held pursuant to the rules established at 11 C.F.R. § 110.13. 11 C.F.R. § 110.13(a)(2) provides that "[b]roadcasters (including a cable television operator, programmer or producer), *bona fide* newspapers, magazines and other periodical publications may stage candidate debates in accordance with this section and 11 C.F.R. § 114.4(f), provided that they are not owned or controlled by a political party, political committee or candidate.

¹ The court in Reader's Digest found that investigations of activities by a press entity are permissible only if one or both of two preliminary questions have been answered; namely, "whether the entity is owned by the political party or candidate and whether the press entity was acting as a press entity" when undertaking the particular activity at issue. 509 F. Supp. at 1215. If the answer to the former inquiry is positive or the answer to the latter inquiry is negative, the press exemption would not apply and an investigation would warranted.

21-04-492-3086

11 C.F.R. § 110.13(b) sets out rules for the structure of candidate debates, stating that the structure of the staging of such debates "is left to the discretion of the staging organization, provided that: (1) such debates include at least two candidates; and (2) the staging organization(s) does not structure the debates to promote or advance one candidate over another." 11 C.F.R. § 110.13(c) addresses candidate selection. According to this provision, "staging organizations must use pre-established objective criteria to determine which candidates may participate in a debate." (Emphasis added.)

B. The Complaints

1. MUR 4956

The complaint designated MUR 4956, dated December 30, 1999 and received by the Commission on January 3, 2000, alleged that the Manchester Union Leader, New Hampshire Public Television, and New England Cable News were going to violate the Commission's regulations by excluding Lyndon LaRouche from participation in the debate between candidates for the Democratic nomination for President which was to be held on January 5, 2000 at the University of New Hampshire. According to Patricia Salisbury, who filed the complaint on behalf of the LaRouche Committee, she "spoke with Mr. Charles Perkins, the executive editor of the Manchester Union Leader, who informed me that Mr. LaRouche would not be invited to join the debate. Mr. Perkins refused to disclose to me what criteria were used to exclude Mr. LaRouche, saying that he wouldn't disclose the criteria because he didn't want the candidates to try and conform to them."

2005-04-14 10:40:40

The complaint asserted that Mr. LaRouche was eligible to participate in this debate “[b]y any objective criteria” “He is a major candidate for the Democratic nomination, and one of only three candidates for the Democratic nomination certified for Federal Matching Funds. He will be on the ballot in the New Hampshire Democratic primary and has already qualified for the Democratic primary ballot in 10 states.” The complaint then alleged that “[t]o provide Mr. [Al] Gore and Mr. [Bill] Bradley with national TV and radio exposure at the exclusion of their only major rival for the Democratic nomination amounts to an expenditure of funds in support of their candidacies and against LaRouche.” According to the complaint, such corporate support would constitute expenditures which are “prohibited under 2 U.S.C. § 441b.”

2. MUR 4962

The complaint in MUR 4962, dated January 10, 2000, but received by the Commission on January 18, 2000, alleged prospective violations of law by WMUR-TV of Manchester, New Hampshire, and by Cable Network News in connection with “a debate of ‘Democratic Presidential Candidates’” to be held in New Hampshire on January 27, 2000, but from which Mr. LaRouche was to be “excluded.” This complaint cited the requirement at 11 C.F.R. § 110.13 that debate sponsors “use ‘pre-established objective criteria’ in determining who to invite to a debate,” and quoted from the Commission’s 1995 Explanation & Justification (“E & J”) for its revised candidate debate regulations as to the necessity of staging organizations being able to show that their “criteria were not designed to result in the selection of certain pre-chosen participants. 60 Fed. Reg. 64,262 (Dec. 14, 1995).” According to the complaint: “To provide Mr. Gore and Mr. Bradley

21.04.402.3000

with national T.V. exposure, just 5 days before New Hampshire's February 1 Democratic Primary, while excluding their only major rival in that election, amounts to an expenditure of funds in support of their candidacies and against LaRouche's candidacy," placing the expenditures in violation of 2 U.S.C. § 441b.

3. MUR 4963

The third complaint, also dated January 10, 2000 and received on January 18, 2000, named as respondents the Los Angeles Times and Cable Network News, and alleges that they would violate the Act as co-sponsors of "a debate among candidates for the Democratic Nomination for President" by excluding Lyndon LaRouche from participation. This debate was to be held on March 1, 2000, in California. The complaint asserted that Mr. LaRouche had been "determined by the California Secretary of State to be a 'generally recognized candidate,' seeking the Democratic Nomination for President," and that Mr. LaRouche had "also demonstrated an active base of support in California, having filed a slate of 379 delegate candidates in all of California's 52 Congressional districts." The complainant again cited the requirement at 11 C.F.R. § 110.13 that "debate sponsors . . . use 'pre-established objective criteria' in determining who to invite to a debate," as well as the language from the 1995 E & J quoted above. This complaint repeats the language in the second complaint alleging that, by including Mr. Gore and Mr. Bradley while excluding Mr. LaRouche, "their only rival in that election," they would make expenditures in violation of 2 U.S.C. § 441b.

21.04.402.3889

C. Responses to Complaints

1. MUR 4956

a. Union Leader Corporation

On January 28, 2000, the Commission received a response to the complaint in MUR 4956 from the Union Leader Corporation of Manchester, New Hampshire ("Union Leader"), publisher of the Manchester Union Leader. The response states that

the Union Leader, along with New England Cable News and New Hampshire Public Television, was the sponsor of debates, one on January 5, 2000, (Democrats), and one on January 6, 2000, (Republicans), among major candidates for the office of President of the United States in the New Hampshire Primary. The joint efforts of the sponsors were termed . . . 'The New Hampshire Primary Debate Partnership,' (hereinafter the 'Partnership').

The response goes on to state:

[I]nvitations to debate were sent to candidates of both the Republican and Democratic parties. The selection of the candidates for invitation was based upon the degree and volume of the activities of the candidate, in New Hampshire, and of the candidate's campaign organization, in New Hampshire, prior to December of 1999. The executive producer of the partnership made a good faith determination that Larouche [sic] did not meet the selection criteria.

The response argues further that "[i]nterference with such decisions by governmental agencies, or by courts, would violate the First Amendment rights of the debate's sponsors." The response quotes from the U.S. Supreme Court's decision in Arkansas Educational Television v. Forbes, 523 U.S. 666, 683, 118 S.Ct. 1633, 1644 (1998), ("Forbes"), in which the Court reversed the Eleventh Circuit Court of Appeals and upheld the public television broadcaster's decision not to include Ralph Forbes, an independent candidate, in a televised debate held in 1992 in Arkansas' Third

21-04-492-3090

Congressional District for candidates for the U.S. House of Representatives.² The Court in Forbes found that the station's selection of candidates had been a "reasonable, viewpoint-neutral exercise of journalistic discretion." Id.

Attached to the Union Leader response was a sworn affidavit from Charles Perkins, Executive Editor of the Manchester Union Leader and the New Hampshire Sunday News. Mr. Perkins states that he was the representative of the Union Leader to the New Hampshire Primary Debate Partnership. He reiterates the language in the Union Leader response regarding the criteria used for inclusion of candidates in the debates, except that he dates the cutoff as "prior to October of 1999." He also states: "Lyndon LaRouche, Jr., was not even considered for inclusion in the 2000 debate as we had seen no evidence of a LaRouche candidacy, or of a LaRouche campaign organization in New Hampshire, prior to October of 1999."

Neither the response submitted by counsel nor the attached affidavit from Mr. Perkins addresses the statement in the complaint that Mr. Perkins "refused to disclose" to the LaRouche campaign the criteria for inclusion in the debate.

b. New Hampshire Public Television

On February 7, 2000, the Commission received a response to the complaint in MUR 4956 from New Hampshire Public Television ("NHPTV"). After establishing that

² In its decision, the Supreme Court found that the debate was held in a "nonpublic forum." The Court then cited precedents establishing that the First Amendment requires any exclusion of speakers from nonpublic fora not to have been based on the speaker's viewpoint and . . . [to] otherwise be reasonable in light of the purpose of the property." The Court found it was "beyond dispute that Forbes was excluded not because of his viewpoints but because he had generated no appreciable public interest" and that "[h]is own objective lack of support, not his platform, was the criterion." Id.

NHPTV and its parent institutions, the University of New Hampshire and the University System of New Hampshire, are tax-exempt educational organizations under 26 U.S.C. § 501(c)(3), and thus eligible to sponsor candidate debates, the response states that during the 1999-2000 primary election period there were 16 ballot candidates for the Democratic nomination in New Hampshire, as well as 14 ballot candidates for the Republican nomination.³ The response then continues:

NHPTV, in consultation with the other two debate sponsors, determined that due to the time constraints of the debate and in order to produce a program which would attract carriage by the media and interest by viewers, the debate would be limited to candidates who met two criteria. To be invited, a candidate must have established a significant personal presence in New Hampshire during the primary campaign and must also have established a significant campaign organization presence in New Hampshire during the primary campaign. In the judgment of the sponsors, all of which are press organizations, two of the candidates for the Democratic nomination clearly met those criteria and were invited. The other 14 candidates clearly did not meet those criteria. . . . After applying their criteria, the sponsors consulted independent public opinion polls which confirmed that the criteria chosen had resulted in invitations to all candidates who had garnered significant voter support. NHPTV submits that these procedures meet the test of 11 C.F.R. § 110.13(b). The sponsors used fair, impartial and reasonable criteria to provide a nonpartisan debate forum for significant candidates to communicate their views to the public. . . . The selection process did not involve any consideration of the background or views of the various candidates. Moreover, in producing these programs NHPTV aimed to create and cover a news event in a traditional political debate format

The NHPTV response argues further that

even if NHPTV did not fall within 11 C.F.R. § 110.13(b), its sponsorship of the debate at issue would be an exempt activity

³ This response notes that "New Hampshire Presidential Primaries attract a large number of marginal candidates because a person can get on the ballot simply by filing a declaration of candidacy and paying a \$1,000 fee."

under 11 [sic] U.S.C. 431(9)(B)(i) and 11 C.F.R. § 100.7(b)(2) and 100.8(b)(2), because it produced the debate in order to distribute it as a news story through the facilities of the University of New Hampshire broadcasting stations which it operates. NHPTV routinely and consistently produces news and public affairs programming concentrating on issues facing its New Hampshire audience, and it therefore should be considered a press entity.

On February 10, 2000, counsel submitted an unsworn "Declaration" signed by Peter Frid, CEO and General Manager of NHPTV, in which Mr. Frid states that the facts in counsel's response are "true and correct."

c. New England Cable News

On January 19, 2000, counsel for New England Cable News ("NECN") responded to the complaint in MUR 4956. After addressing the origin and content of the Commission's regulations governing candidate debates, counsel applies the regulations to his client. First, he asserts that "NECN is a broadcaster as defined by 11 C.F.R. § 110.13, and is not owned or controlled by a political party, political committee or candidate." Secondly, "[t]he debate included Vice President Al Gore and Senator Bill Bradley, thereby meeting the requirement of at least two candidates under, 11 C.F.R. § 110.13(b(1))." With regard to pre-established criteria, counsel states:

Mr. Charles Perkins, the executive director of the Manchester Union Leader, informed the Committee for New Bretton Woods that the criteria would not be disclosed as the sponsors did not want the candidates to attempt to conform with the criteria. 11 C.F.R. § 110.13(c) does not require that the criteria used for candidate selection be disclosed, the section requires only that the staging organization use pre-established criteria in candidate selection. The sponsors did use pre-established criteria for the selection of candidates. The mere fact that Mr. LaRouche did not conform to the criteria does not result in a violation of Federal Election Commission Regulations.

21-04-402-3093

d. Gore 2000, Inc.

On February 4, 2000, Gore 2000, Inc., the authorized committee of Vice-President Albert Gore for his campaign for nomination to the office of President, responded to the complaint in this matter. Counsel notes that the complaint itself did not "intend to name any presidential campaigns in this matter," and asserts that "naming the debate participants in this particular case as respondents is not only extraneous to the appropriate FEC analysis, it renders the Commission's debate regulations unworkable."

In support of its argument that the debate "cannot be considered a contribution to the participants," the Gore 2000 response argues that there is nothing in 11 C.F.R. § 110.13 which "requires the candidates, as a condition of participating, to make an independent conclusion as to whether the sponsor complied with the requirements of that section. In addition, nothing under that provision allows debate participants to dictate or otherwise select who else may participate, and the Committee was unable to do so here." According to this response, it is the burden of the staging organization to determine and schedule the participants, not that of the participants themselves. The response continued:

The Commission could not have possibly intended that any candidate - eager to have his or her message heard - should have this burden. Here, the Committee was eager for its candidate to debate; it was not asked whether Mr. LaRouche should be invited, and it did not offer any suggestion or opinion on the issue. . . . Clearly, participants should not have contributions attributed to them from the debate funding source, when the determination as to who to include in the debate was made independently by the sponsors.

The response next argues that "the press exemption" at 11 C.F.R. § 100.7(b)(2) means that the debate cannot be considered a contribution. The response states: "As well recognized media outlets, the sponsors may hold such events as they deem newsworthy, in such a format and under such conditions as they design, as long as it is consistent with the so called press exemption. Complainant makes no allegation to the contrary, and this must be dispositive of this matter."

Counsel argue further that reading what they term the "reasonable opportunity" requirement of the press exemption at 11 C.F.R. § 100.7(b)(2) to require inclusion of Mr. LaRouche in the debate "would lead to absurd consequences." "The Commission has no jurisdiction to impose an equal time provision on a media-sponsored event. In fact, the Commission has a long history of deference to the media's determination of newsworthiness including format, sponsorship and coverage of events. Such deference should be accorded here." Counsel then cite MUR 4473 and MUR 4451 in which the Commission dismissed allegations raised by candidates not invited to participate in debates. (See analysis below.)

e. Bill Bradley for Senate

In a response addressing all three complaints here at issue, counsel for Bill Bradley for Senate, Inc. and its treasurer state:

The complaints present no violation of the Federal Election Campaign Act ("the Act") by the Committee. They do not claim that the Committee violated the Act. Rather, they claim only that the sponsors, being corporations, made prohibited expenditures under the Act. In any event, the Committee is unaware that the sponsors used anything other than objective criteria in selecting candidates to participate.

21-04-402-3095

2. MUR 4962

a. Cable News Network (CNN)

The response to the complaint filed on behalf of Cable News Network ("CNN") was received by the Commission on February 23, 2000. CNN argues that it is permitted to "'stage' candidate debates without violating the prohibition on corporate contributions as long as the structure of the debates meets the criteria set forth in 11 C.F.R. and the selection of candidates follows CNN's pre-established objective criteria." Counsel then asserts:

In inviting [the] two candidates, CNN considered each candidate in relation to its pre-established criteria set forth below:

- Is the candidate actively campaigning;
- The candidate's ability to fundraise/level of financial support;
- Percentage of votes won in a caucus or primary;
- Where did the candidate stand in the public opinion polls.

The response goes on to state that "[a]t the time of the debates CNN had no evidence that Mr. LaRouche was actively campaigning. Mr. LaRouche had not raised a significant amount of money and was not factoring high enough in public opinion polls. As a result of this analysis, CNN did not extend Mr. LaRouche an invitation to participate in the January 27 debate."

b. WMUR-TV

Counsel for WMUR-TV submitted a response to the complaint in MUR 4962 on February 16, 2000. According to the response, WMUR-TV invited two candidates to the January 27, 2000, debate after considering "the following pre-established criteria":

1. Did the candidate have an organized campaign structure both in New Hampshire and nationally;

2004.02.23.096

2. What was the candidate's standing in public opinion polls;
3. Was the candidate actively campaigning in New Hampshire;
4. Newsworthiness.

The response then continues: "At the time of the debate WMUR-TV had no indication that Mr. LaRouche was actively campaigning in New Hampshire. In addition, Mr. LaRouche had registered little or no results in public opinion polls, and did not appear to have any significant New Hampshire organization in place. As a result of the analysis of these factors, WMUR-TV did not invite Mr. LaRouche to participate in the January 17th debate."

c. Gore 2000, Inc.

In their response to the complaint in MUR 4962, counsel for Gore 2000, Inc., cite to and incorporate their response in MUR 4956, stating that in that response "we demonstrated that Gore 2000 could not be found to have violated Federal election law by participating in a bona fide debate sponsored by legitimate media outlets and which complied on its face with both the debate regulation at 11 CFR § 110.13 and the press exemption to the definition of contribution at 11 CFR § 110.7(b)."

d. Bill Bradley for President, Inc.

(See discussion of response to all three complaints above.)

3. MUR 4963

a. Cable News Network

On February 17, 2000 counsel for CNN responded to the complaint in MUR 4963 which addressed the debate to be held on March 1 in California. This response echoes CNN's earlier response in MUR 4962 discussed above, differing only in the additions, to

21-04-402-3097

the discussion of its "pre-established criteria," of a set percentage (10%) of votes received in a caucus or primary and of a fifth criteria, namely whether the candidate was on the California ballot. The response states: "Although Mr. LaRouche is a candidate on the California ballot, Mr. LaRouche did not receive 10% of the votes in the New Hampshire primary." The response continues: "Furthermore, CNN has no evidence that he is actively campaigning, and Mr. LaRouche continues to rate very low, if at all, in public opinion polls."

b. Los Angeles Times

The Los Angeles Times did not respond to the complaint.

c. Gore 2000, Inc.

The response from counsel for Gore 2000, Inc. in this matter incorporates by reference the responses filed in MUR 4956 and MUR 4962, and states that, even though there was a new debate sponsor in this matter, namely the Los Angeles Times, "the identical analysis should be applied by the Commission to dismiss this matter."

d. Bill Bradley for President, Inc.

(See discussion of response to all three complaints above.)

C. Analysis

The complainant in all three of the matters addressed in this report argues that the media organizations named as respondents each violated 2 U.S.C. § 441b by failing to include Lyndon LaRouche in debates which they staged in New Hampshire and/or California in January and March, 2000. The complainant asserts that "by any objective

21.04.402.3098

criteria Mr. LaRouche should be [or should have been] included in the debate[s].” As evidence of his eligibility, the complainant points in each instance to Mr. LaRouche’s receipt of federal matching funds, and argues that he was “actively campaigning” in the two states involved and “throughout the country.” The complaints allege that the exclusion of Mr. LaRouche from the debates resulted in “expenditures of funds in support of [the candidacies of Vice-President Al Gore and Senator Bill Bradley] and against LaRouche’s candidacy.”

As stated above, 2 U.S.C. § 431(8)(B)(i) and the Commission’s regulations exempt from the definitions of contribution and expenditures the costs of covering or carrying a news story defrayed by a press entity, unless that entity is owned or controlled by a candidate, political committee or political party. In addition, 11 C.F.R. § 114.4(f)(2) expressly permits incorporated media organizations to stage candidate debates, so long as they do so “in accordance with 11 C.F.R. § 110.13.” 11 C.F.R. § 110.13(a)(2), (b) and (c) and § 114.4(f)(2), however, when read together, impose certain rules upon media organizations choosing to stage, not just cover, candidate debates. Specifically, the staging organization must “use,” *inter alia*, “pre-established objective criteria” for the selection of participant candidates.

The common questions raised by all of the complaints are whether the respondent media organizations had pre-existing objective criteria for the selection of participants and whether those criteria were applied. These questions, however, must be addressed in the larger context of the overall statutory exemption of media organizations acting as such from the statutory prohibition on corporate contributions and expenditures made in

21.04.402.3099

connection with federal elections. As is discussed below, this larger context, with its implications for First Amendment press freedoms, should have an effect upon the level of evidentiary showing required of media organizations in order for them to meet the standards for staging debates set forth in the Commission's regulations. Once they pass the Reader's Digest tests of no candidate or political committee ownership and of traditional press function, an application of the Commission's regulations regarding the staging of debates by media organizations, including those for participant selection, must not result in hurdles that could be found to be unreasonably high.

1. MUR 4956

a. Objectivity of Criteria

According to one of the staging organizations, Union Leader Corporation and its executive editor, Charles Perkins, the selection criteria applied with regard to the January 5, 2000 Democratic presidential candidate debate were, in Mr. Perkins' words: "the degree and volume of the activities of the candidates, in New Hampshire, and of the candidate's campaign organization, in New Hampshire, prior to October of 1999."⁴

⁴ As indicated above, there is a discrepancy between the candidate selection cut-off date of December cited by counsel for the Union Leader and the October date cited by Mr. Perkins in his affidavit. It appears from press stories that the correct date is October. According to an Associated Press Newswire story dated October 20, 1999, Senator Bill Bradley and Vice-President Al Gore were at that time in the process of deciding upon which debate invitations they could agree. Cited in the article are, inter alia, "[a debate] on Jan. 4 sponsored by the Union Leader of Manchester, N.H." and "a debate sponsored by New Hampshire's WMUR-TV in Manchester on Jan. 27." Thus, it appears that invitations to the debates to be held in New Hampshire had been issued to candidates prior to the date of this article and thus in mid-October or earlier.

Another Associated Press Newswire story dated January 5, 2000, addressed the result of a presidential candidate's lawsuit in federal court appealing his exclusion from the January 6

21.04.492.3100

NHPTV, another of the three staging organizations, has described basically the same criteria differently as the establishment by a candidate of "a significant personal presence in New Hampshire during the primary campaign" and the establishment of "a significant campaign organization presence in New Hampshire during the primary campaign."

New England Cable News simply asserts the existence of pre-existing criteria. None of the three sponsoring corporations discusses the timing or the method of establishing selection criteria. Only one refers to discussions among the three staging organizations about such a process.

Further, none of the responses sets out tests used to measure the "degree and volume" of the activities of the candidates or their organizations, or defines "significant . . . presence." There are, however, Commission precedents for measuring objectivity that do not require rigid definitions or required percentages. In 1998, the Commission addressed similar, albeit more detailed, candidate selection criteria in MURs 4451 and 4473 and concluded that in those matters the criteria were sufficiently "objective" to meet the requirements of the regulations. MURs 4451 and 4473 addressed the candidate

Republican candidate debate organized by the same staging organizations as those staging the Democratic debate the preceding day. At a hearing on January 5, the magistrate stated that he would recommend dismissing the suit, and, according to the news account, also stated that there was no emergency involved because complainant, Andy Martin [a/k/a Anthony Martin-Trigona], had waited two months after the debate invitations were sent out to file his complaint. This statement would constitute additional evidence that the invitations were issued prior to December, 1999.

It is possible that, if a candidate's status had changed between October and December, 1999, so that he or she met in December the criteria that had not been met in October, an invitation might have been forthcoming for the early January, 2000 debate. If that were the case, there may be no discrepancy between the dates cited by the Union Leader and by its editor. In any event, the apparent discrepancy has no bearing on the recommendations in this matter.

21-04-402-3101

selection criteria used in the staging of debates between candidates in the 1996 general election for the offices of President and Vice-President. The staging organization, the Commission on Presidential Debates ("CPD"), invited only the candidates of the Democratic and Republican parties to participate, a decision challenged in complaints filed with the Commission by Dr. John Hagelin and Mike Tompkins, candidates for president and vice-president of the Natural Law Party, and by Perot '96, Inc., the authorized committee of Ross Perot and Pat Choate, the presidential and vice-presidential candidates of the Reform Party. In response to the complaints in these matters, the CPD supplied to the Commission the written candidate selection criteria which it had prepared and assertedly used for the 1996 general election debates.

The introduction to the CPD criteria stated: "A Democratic or Republican nominee has been elected to the Presidency for more than a century. Such historical prominence and sustained voter interest warrants the extension of an invitation to the respective nominees of the two major parties to participate in [CPD's] 1996 debates."⁵ The CPD then set out three "non-partisan" criteria to be applied in deciding which, if any, nonmajor party candidates would also be invited. The CPD stated expressly that "no quantitative threshold that triggers automatic inclusion" was

⁵ The CPD argued in its response to the complaints that it did in fact apply its criteria to the nominees of the two major parties and that their invitations were thus not automatic.

2013-04-02 12:04:02

contemplated. "Rather, [CPD] will employ a multifaceted analysis of potential electoral success, including a review of (1) evidence of national organization,⁶ (2) signs of national newsworthiness and competitiveness,⁷ and (3) indicators of national enthusiasm or concern,⁸ to determine whether a candidate has a sufficient chance of election to warrant inclusion in one or more of its debates." No non-major party candidate was invited to participate.

The Office of the General Counsel recommended that the Commission find reason to believe in both matters that the CPD had violated 2 U.S.C. § 441b by not complying with the requirements of 11 C.F.R. § 110.13(c). This recommendation was based upon

⁶ Factors to be considered as showing "evidence of national organization" were:

- a. Satisfaction of the eligibility requirements of Article 11, Section 1 of the U.S. Constitution.
- b. Placement on the ballot in enough states to have a mathematical chance of obtaining an electoral college majority.
- c. Organization in a majority of congressional districts in those states.
- d. Eligibility for matching funds or other demonstration of the ability to fund a national campaign, and endorsement by federal and state officeholders.

⁷ Examples of factors to be considered as showing "signs of national newsworthiness and competitiveness" were:

- a. The professional opinions of the Washington bureau chiefs of major newspapers news magazines and broadcast networks.
- b. The opinions of a comparable group of professional campaign managers and pollsters not then employed by the candidates under consideration.
- c. The opinions of representative political scientists specializing in electoral politics at major universities and research centers.
- d. Column inches on newspaper front pages and exposure on network telecasts in comparison with the major party candidates.
- e. Published views of prominent political commentators.

⁸ Listed factors to be considered as showing "national public enthusiasm" were:

- a. The findings of significant public opinion polls conducted by national polling and news organizations.
- b. Reported attendance at meetings and rallies across the country in comparison with the two major party candidates.

21 04 402 3103

the view that the CPD's criteria for candidate selection were not objective, as required by the regulation, with the factors applied as "signs of national newsworthiness and competitiveness" being deemed the most problematic because they involved reliance upon the opinions of groups of professionals. The First General Counsel's Report also noted, inter alia, that the staging organization had not described its multifaceted analysis of the many factors involved and that the factors were listed in "non-exhaustive fashions," opening up possibilities for additional considerations to have been applied.

On February 24, 1998, the Commission found by a vote of 5-0 that there was no reason to believe that the CPD had violated the law in either matter. On April 6, 1998, the five Commissioners issued a Statement of Reasons explaining their votes. In this Statement, the Commissioners wrote:

After a thorough and careful examination of the factual record, the undersigned commissioners unanimously concluded the Commission on Presidential Debates used "pre-established objective criteria" to determine who may participate in the 1996 Presidential and Vice-Presidential Debates.

The CPD was set up and structured so that the individuals who made the ultimate decision on eligibility for the 1996 debates relied upon the independent, professional judgment of a broad array of experts. The CPD used multifaceted selection criteria that included: (1) evidence of a national organization; (2) signs of national newsworthiness and competitiveness; and (3) indicators of national enthusiasm or concern. We studied these criteria carefully and concluded that they are objective. Moreover, we could find no indication or evidence in the factual record to conclude that the criteria "were designed to result in the selection of certain pre-chosen participants."

While the Supreme Court's decision in Arkansas Educational Television v. Forbes, cited by the Union Leader in its response to the complaint, was based on the

Constitution and not on the Commission's regulations, its analysis is helpful in considering the "objectivity" issue. In that case, the Court found that the selection of participants for the debate in question, one among candidates for the U.S. House of Representatives, to have been "a reasonable, viewpoint neutral exercise of journalistic discretion." 523 U.S. at 683. Ralph Forbes, who was running as an independent candidate, argued that his exclusion from the debate was contrary to the First Amendment. The Court found that his exclusion was the result of his having "generated no appreciable public interest." The Court stated:

There is no substance to Forbes' suggestion that he was excluded because his views were unpopular or out of the mainstream. His own objective lack of support, not his platform, was the criterion. . . . Nor did AETC exclude Forbes in an attempted manipulation of the political process. . . . AET excluded Forbes because the voters lacked interest in his candidacy, not because the AETC itself did.

It appears from the above precedents that, in the context of staging debates, "objective" selection criteria are not required to be stripped of all subjectivity or to be judged only in terms of tangible, arithmetical cut-offs. Rather, it appears that they must be free of "content bias," and not geared to the "selection of certain pre-chosen participants." Thus, criteria based on significant personal and campaign organization presence, as opposed to policies or platforms, appear to be "objective" criteria permissible under the statute and regulations. This Office concludes that the criteria used by the staging organizations responsible for the January 5, 2000 debate in New Hampshire met the objectivity requirement of the regulations.

2025-04-04 10:42:31

b. Pre-establishment of Criteria

The respondent staging organizations have not provided any contemporaneous written documentation showing the history of the candidate selection criteria used for the January 5 debate; i.e., they have not provided any information concerning the methods and dates by which the criteria were compiled and applied. No information has been provided about meetings, telephone conversations, an exchange of drafts, or other forms of communication on this issue.

NHPTV's response states that, because of the large number of candidates who filed as presidential candidates in New Hampshire, two criteria for candidate selection were established after consultation with the other debate sponsors, namely "a significant personal presence" in New Hampshire and "a significant campaign presence" in New Hampshire. The Union Leader also sets out two bases for candidate selection, asserts that two criteria were applied to both Democratic and Republican candidates, with two Democrats being invited to that party's debate and five Republicans to that party's debate, and states that "Larouche did not meet the selection criteria." Counsel for New England Cable News simply states that "the sponsors did use pre-established criteria for the selection of candidates."

There is little guidance available in the debate regulations and in the related E & J regarding the requisite evidence that would prove that selection criteria were established prior to the sending of debate invitations. The regulation at 11 C.F.R. § 110.13(c) speaks only in terms of "using" pre-existing, objective criteria, and provides no standards as to how such use can be proven. While the E & J states that "[s]taging organizations must be

21-04-402-3106

able to show that their objective criteria were used to pick the participants . . .", it also notes that, while "those staging debates would be well-advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate," the regulation does "not require staging organizations to do so . . ." 60 Fed. Reg. 64,261-64,262. Thus, the Commission has stated that organizations staging candidate debates must be able to show the application of pre-existing objective criteria; however, it has also specifically stated that the regulations do not require the criteria to be reduced to writing or shown to candidates in advance.

Thus, the threshold question presented here is whether the assertions by respondents in MUR 4956 that they had, and used, particular, "pre-established" criteria are sufficient evidence of such criteria. On the one hand, the respondents have not provided extrinsic support for their statements regarding the formulation of criteria prior to the time the initial candidate invitations were extended in early or mid-October, 1999.⁹ On the other hand, the executive editor of the Manchester Union Leader has submitted a sworn affidavit averring that the debate sponsors had pre-existing criteria, and the general manager of NHPTV has provided an unsworn declaration to the same effect. The criteria they cite are, in essence, the type of criteria that would be expected of media organizations interested in staging a debate that would attract viewers.

⁹ There is a certain inconsistency in the NHPTV response in that it states that there were 16 "ballot candidates for the Democratic nomination" and seems to indicate that this led to a need to limit the number of debaters and thus to the criteria chosen; however, the official filing date was not until November 8, 1999, and only two candidates filed on that date.

21.04.402.3107

Given the assertions by the sponsoring media organizations outlined above, and in view of the importance of the overarching statutory exemption of media organizations from the definitions of "contribution" and "expenditure" with regard to activity involving federal elections, this Office finds no basis for concluding that the staging organizations in this matter did not meet the regulatory requirement for pre-established candidate selection criteria. The regulations themselves require the "use" of "pre-established objective criteria. The Commission in the E & J has said that media organizations must be able to show the application of pre-existing criteria, but need not reduce such criteria to writing or show them in advance to candidates - - the two most obvious ways to prove the existence of such criteria. Thus, a balance has been struck. While reliance upon undocumented affirmative statements submitted by or on behalf of respondents may not suffice in other contexts, this Office believes that such statements should be accepted as sufficient in situations to which the media exemption would otherwise apply, so long as the evidence shows that the criteria cited were used in a manner consistent with the media organizations' affirmative statements.

c. Application of the Selection Criteria

The Union Leader has said that it looked to "the degree and volume of the activities" of the candidate and the candidate's campaign organization in New Hampshire, while NHPTV says it looked for a candidate's "significant personal presence" in the state and also for a "significant campaign organization presence" there. The next step is thus to examine Mr. LaRouche's personal and campaign presence in New Hampshire, both prior to the issuing of debate invitations and/or prior to the debate itself,

2014-04-23 10:23:08

in order to determine whether an application of the respondents' stated criteria to his situation would reasonably have resulted in his not being invited to participate in the January 5 debate.

Contemporary news accounts and reports filed by the LaRouche campaign with the Commission show that the actual extent of LaRouche campaign-related activities in New Hampshire was very low before early/mid-October, 1999, and thus prior to the date when invitations to the debate were apparently first extended to candidates. This situation continued into the period just before the debate itself.

According to one press account, Lyndon LaRouche did not personally visit the state until after the January 5 debate. This account, an Associated Press Newswire story dated January 13, 2000, states:

Mr. LaRouche had returned to New Hampshire [on January 13] for another run at the presidency. . . . He had been in Germany recovering from heart problems, slowing his campaign appearances. His first trip to the state with the earliest primary was to hold a news conference and to tape an Internet audio broadcast.

With regard to the presence of a LaRouche campaign organization, the LaRouche Committee's 1999 October Monthly Report shows only \$9.15 allocated at that point to New Hampshire. The Gore campaign had already allocated \$126,300 to New Hampshire and the Bradley campaign had allocated \$26,202. The LaRouche campaign's 1999 Year-End Report shows a total of \$2,682.42 spent in New Hampshire in 1999, virtually all between October 1 and December 31. The LaRouche Committee's itemized New Hampshire expenditures included \$1,000 for "filing fee" on October 27, which was after the initial debate invitations had been extended, and two payments on December 22 and

21-04-402-3109

30 totaling \$275 to the Holiday Inn in Concord for "meeting room rental." No payments for office or headquarters rental or for hotel accommodations and meals for staff are itemized during the period covered by this latter report. Itemized New Hampshire-related debts owed at the end of 1999 included only \$398.77 owed the Manchester Union Leader for "advertising."

Thus, the news account cited above and the Committee's 1999 October Monthly and Year-End reports show that, prior to a candidate selection cut-off date of October 1, and even just prior to the debate on January 5, there had been no "presence" of Mr. LaRouche himself in New Hampshire and little presence or activity there on the part of his campaign organization. Given these apparent realities of the LaRouche campaign in the state, the staging organizations' decisions not to include him in the January 5, 2000, debate appear consistent with their stated criteria. The mere fact of having become eligible to receive federal matching funds, no matter in what amount, should not be enough in itself to overcome his campaign's relative lack of presence in New Hampshire, and, in any event, the receipt of matching funds was not one of the criteria assertedly used by the staging organizations.

It also appears from the responses to the complaint that the application of the criteria outlined by the Union Leader and by NHPTV differed from political party to political party in terms of the number of candidates invited to participate, and also resulted in the exclusion of many candidates, not just Mr. LaRouche. Thus, it is apparent that he was not singled out for exclusion. Nor is there evidence in the complaint that Mr. LaRouche was excluded from the debate because of his stated views.

2104402310

Certain questions do arise with regard to the timing of the application of the selection criteria, as it appears that Vice-President Gore and Senator Bradley were invited to participate in the debate in early to mid-October, 1999, and thus weeks before it was known that fourteen other Democratic candidates would file as presidential primary candidates in the state on or after November 8, 1999, the earliest filing date. According to an Associated Press Newswire story dated November 8, 1999, only two candidates filed that day to be on New Hampshire's presidential primary ballot: Democrat Lyndon LaRouche and Republican Sam Berry. It is also not known whether a form of "rolling" selection process was anticipated and used by the debate staging organizations. Even such a process was in place, it does not appear that any other Democratic candidate emerged prior to the debate who would have met the stated criteria.

Nevertheless, in light of the respondents' separate assertions that particular pre-established, albeit broadly stated, selection criteria were used for inviting candidates to participate in the January 5, 2000, presidential debate in New Hampshire; the apparent objective nature of those criteria; the absence of regulatory requirements that candidate selection criteria be in writing and be made available to candidates; and the evidence of the absence of Mr. LaRouche from New Hampshire and of the low level of his campaign organization there both prior to selection of participants in the debate and prior to the debate itself, this Office recommends that the Commission find no reason to believe the Union Leader Corporation, New Hampshire Public Television and New England Cable News violated 2 U.S.C. § 441b.

21-04-402-311

With regard to the two candidate committees allegedly benefited by the staging organizations' selection process, this Office agrees it is the staging organizations' responsibility to select candidates to participate in a debate, not that of the candidates. Candidate responsibility would require involvement in the selection process, and to involve the candidates in that process would be to destroy the very objectivity and impartiality sought by the Commission's debate regulations. Therefore, this Office recommends that the Commission find no reason to believe that Gore 2000, Inc., and Jose Villarreal, as treasurer, and Bill Bradley for President, Inc., and Theodore V. Wells, Jr., as treasurer, violated 2 U.S.C. § 441b in this matter.

2. MUR 4962

a. Objectivity of Criteria

The complaint in this matter addresses the selection of candidates to participate in the January 27, 2000 presidential primary debate in New Hampshire staged by WMUR-TV and Cable Network News. Counsel for WMUR-TV has asserted that her client used four "pre-established criteria," namely, (1) whether the candidate had "an organized campaign structure both in New Hampshire and nationally," (2) "[w]hat was the candidate's standing in public opinion polls"; (3) "[w]as the candidate actively campaigning in New Hampshire"; and (4) "[n]ews-worthiness." Counsel argues that there was "no indication that Mr. LaRouche was actively campaigning in New Hampshire." Further, he "had registered little or no results in public opinion polls, and did not appear to have any significant New Hampshire organization in place."

21-04-4962-312

Counsel for CNN argues that her client had four "pre-existing criteria:" (1) whether the candidate was "actively campaigning"; (2) "[t]he candidate's ability to fundraise" and his "level of financial support"; (3) "the percentage of votes won in a caucus or primary" [in a footnote counsel states that this element was not applicable to the debate at issue as there had been no previous caucus or primary]; and (4) the candidate's standing in public opinion polls. Counsel asserts that "CNN had no evidence" of Mr. LaRouche's "active campaigning"; that he "had not raised a significant amount of money"; and that he "was not factoring high enough in public opinion polls."

Thus, counsel for the two staging organizations in MUR 4962 each set out candidate selection criteria which were, with the exception of CNN's citation of "financial support," relatively similar, but which were also general in concept and lacking in specific standards for measuring whether or not a candidate had met particular requirements. For example, the criteria set out by counsel for WMUR-TV did not specify what was required in order to demonstrate "an organized campaign structure," what level of "standing in public opinion polls" was needed, what was meant by "actively campaigning," and how "newsworthiness" was to be defined. No definitions or standards for "actively campaigning," "ability to fundraise," and "level of financial support" have been provided.

Again, it could be argued that the criteria set out by the respondents in this matter do not meet an "objectivity" test. However, while there are differences of degree between the CPD criteria, which were addressed in MURs 4451 and 4473 and found to have been objective by the Commission, and the less comprehensive approach used by the staging

21-034-492-313

organizations in MUR 4962, the latter organizations' criteria do not appear to have been content driven or geared to selecting pre-chosen participants. Rather, as in MUR 4956, they addressed the candidates' respective levels of organization and campaigning in New Hampshire and, in this matter, nationwide. They also looked to the respective levels of public interest in the candidates. Therefore, the criteria outlined appear to have been sufficiently "objective" for purposes of the statute and regulations.

b. Pre-establishment of Criteria

As in MUR 4956, the respondent staging organizations have not supplied documentation in support of their assertions of the pre-establishment of their stated criteria. The timing and method of deciding upon the criteria are not discussed in their responses. The only evidence that the criteria did pre-exist the invitation process consists of statements by counsel submitted on behalf of the two respondent staging organizations in response to the complaint.

Both statements, however, do assert that there were such criteria. And, again, the criteria outlined are the type one would expect to be applied by media organizations functioning as such. Thus, the key question is whether the evidence shows that the media organizations used their stated criteria.

c. Application of the Selection Criteria

Both CNN and WMUR-TV have listed as criteria active campaigning by a candidate in New Hampshire and his or her standing in public opinion polls, while CNN has also included a campaign structure in New Hampshire and the level of financial support, and WMUR-TV has cited "newsworthiness." As stated above, Mr. LaRouche

21-04-402-314

did not personally appear in New Hampshire until January 13, and thus only two weeks before the January 27 debate, long after the invitations to that debate were initially extended, and only two and a half weeks before the primary.

Regarding Mr. LaRouche's campaign in New Hampshire, and as noted above, his committee's reports as of the 1999 October Quarterly showed expenditures allocated to New Hampshire of only \$9.15, while the Gore campaign had allocated \$126,300 to that state and the Bradley campaign had allocated \$26,202. The LaRouche Committee's 1999 Year-End Report reported \$2,682 in expenditures allocable to New Hampshire, while its 2000 February Monthly Report, reflecting activity just before and after the January 27 debate, shows that total campaign expenditures allocable to New Hampshire had reached \$41,646. Of this figure, \$24,242.82 is shown as itemized expenditures for media advertising, mostly radio spots, leaving about \$14,700 in other, unitemized expenditures allocable to the New Hampshire campaign between October 27 and January 31. The February report itemizes only one operating expenditure made to a New Hampshire-based vendor, a \$338.30 expenditure dated January 15 for a meeting room; there are no other itemized expenditures in this report to New Hampshire vendors for travel and travel-related costs such as hotel accommodations or meals. By contrast, as of their 2000 February Monthly reports, the Gore and Bradley campaigns had allocated \$479,921 and \$560,949 to New Hampshire respectively, and these candidates had been in the state on numerous occasions.

CNN included a candidate's "level of financial support" as one of its criteria.

The LaRouche Committee's 1999 October Quarterly Report shows that its national

21-04-402-315

campaign as a whole, as of the end of September, 1999, had received \$1,300,718 in contributions. This level of financial support contrasts with the \$24,291,739 received by Vice-President Gore's campaign and the \$19,019,945 received by Senator Bradley's campaign as of the same date. As of the Year-End Reports filed by these candidates, the LaRouche Committee reported a total of \$1,955,217 in contributions received in 1999, while Gore 2000, Inc., reported a total of \$28,186,946 and Bradley for President reported a total of \$27,415,838.

With regard to his standing in public opinion polls, an American Research Group's poll in New Hampshire of 600 likely Democratic voters, taken October 14-19, 1999, resulted in 45% for Senator Bradley, 41% for Vice-President Gore and 14% undecided; Mr. LaRouche was not mentioned. A Los Angeles Times poll taken November 13-18, 1999 in New Hampshire of 249 registered Democratic voters resulted in 43% for Gore, 42% for Bradley, 1% for "someone else" and 14% undecided. Again, Mr. LaRouche was not mentioned. An Associated Press Newswire story dated January 28, 2000, the day after the debate, set out the results of four polls undertaken in New Hampshire between January 23-26. All four cited results for Vice-President Gore (ranging from 50% to 57%) and Senator Bradley (ranging from 36% to 44%), with no mention of Lyndon LaRouche.

As in MUR 4956, there are unanswered questions about the timing of candidate selection for the January 27 debate. It appears that Vice-President Gore and Senator Bradley were invited to participate as early as mid-October 1999, and it is not known whether the staging organizations later considered inviting other candidates based upon

21.04.402.316

updated information. Nevertheless, the analysis applied to the facts set out with regard to MUR 4956 apply to this second matter. While the invitations to candidates to participate in the January 27 debate were apparently extended relatively early, those who issued the invitations have stated that they did have pre-established objective criteria for selecting participants. It appears that no other Democratic candidates met the stated criteria between the issuance of the invitations and the date of the debate itself; the polling results would have supported such a status quo. There is no evidence that Mr. LaRouche was singled out for exclusion or that he was excluded because of his political views.

Additional considerations include the facts that Mr. LaRouche's personal presence in New Hampshire did not begin until two weeks before the second debate, and that the level of presence of his campaign organization in the state at the time the invitations were extended, and also immediately preceding the debate, was low, with the possible exception of purchases of radio advertising. As for the period immediately before and after the January 27 debate, there is little evidence of a sustained presence in the form of a headquarters or of a cadre of staff. Further, and as noted above, throughout the pre-debate period Mr. LaRouche's national fundraising was greatly below that of the two invited candidates. And his standing in the polls was apparently either non-existent or so low as to not warrant mention in press accounts.

Again, given the respondents' separate assertions that they did have pre-established candidate selection criteria for the January 27 debate, the apparent objectivity of those criteria and their application in the selection of the debate participants, the lack of regulatory requirements regarding the need for written candidate selection criteria and

21-04-442-317

for making them available to candidates, and the continuing low level of LaRouche campaign activities and apparent support in New Hampshire prior to the selection of debate participants and at the time of the debate, this Office recommends that the Commission find no reason to believe WMUR-TV and Cable News Network violated 2 U.S.C. § 441b by excluding Mr. LaRouche from the debate at issue in this matter. For the reasons discussed above in the context of MUR 4956, this Office also recommends that the Commission find no reason to believe that Gore 2000, Inc., and Jose Villarreal, as treasurer, and Bill Bradley for President, Inc., and Theodore V. Wells, Jr., as treasurer, violated 2 U.S.C. § 441b.

3. MUR 4963

a. Objectivity of Criteria

MUR 4963 addresses the Democratic presidential candidate debate held in Los Angeles, California, on March 1, 2000 which was co-sponsored by the Los Angeles Times and Cable Network News. As noted above, the Los Angeles Times has not responded to the complaint. Counsel for CNN has argued that in this case there were five criteria for inviting participants: (1) whether the candidate was "actively campaigning"; (2) "[t]he candidate's ability to fundraise" and the "level of financial support"; (3) whether the candidate had "won 10% of the votes in a caucus or primary"; (4) the candidate's standing "in the public opinion polls"; and (5) whether the candidate was "on the California ballot."

As is the case in the other two matters here at issue, the selection criteria as outlined do not define several key words and phrases, including "actively campaigning,"

“ability to fundraise,” and “level of financial support.” The criteria set forth by counsel are, however, more detailed than those outlined in MUR 4956 and MUR 4962. For example, a specific percentage (10%) of votes in an earlier primary was required, as was the presence of the candidate on the state’s ballot. Given the addition of a specific percentage of votes received in a previous primary, it would be even more difficult, in light of Commission precedent and Forbes, to argue that the criteria used were not “objective.”

b. Pre-Establishment of Criteria

As in the other matters, the staging organizations in MUR 4963 have not provided written documentation showing that their candidate selection criteria pre-existed their early selection decisions. More specifically, no evidence of a decision-making process has been supplied, and thus no information is in hand concerning the timing and method of determining which criteria would be used.

The response to the complaint submitted on behalf of CNN does, however, discuss what are termed “pre-established criteria.” It lists the criteria assertedly used for the January 27 debate at issue in MUR 4962, adding a more specific percentage of votes received in an earlier primary (10%) and a new requirement - the presence of the candidate on the California ballot. As with the earlier matters, the criteria outlined are ones to be expected of media organizations. The inquiry thus shifts to the application of the asserted criteria.

c. Application of Selection Criteria

CNN has argued that Mr. LaRouche did not receive 10% of the vote in the New Hampshire Democratic primary and that it had no evidence that he was "actively campaigning." According to an Associated Press Newswire account of the official returns in the New Hampshire primary dated February 2, 2000, Mr. LaRouche received 124 votes and thus less than 1% of the Democratic vote in that contest.¹⁰

Regarding the level of his campaign activities in California, a preliminary search of Westlaw has produced no news stories regarding visits by Mr. LaRouche to California after his return from Germany and during the primary season. The LaRouche Committee's 1999 October Quarterly Report showed a total of \$25,488 in expenditures allocated to that state. By this time, and thus apparently just before invitations were issued for the March 1 debate, the Gore campaign had allocated \$496,318 to California while the Bradley campaign had allocated \$6,694. By the 2000 March Monthly reports, which covered the period just before the March 1 debate, the LaRouche total had risen to \$59,459; however, this figure did not begin to reach the \$2,639,863 allocated by Gore 2000, Inc. to California or the \$3,845,226 allocated by Bradley for President as of the same reporting period. As stated above, nationally the LaRouche Committee had reported receiving, as of its 1999 October Quarterly Report, a total of \$1,300,718 in contributions while the Gore campaign had reportedly received \$24,291,739 and the Bradley campaign had received \$19,019,945. By its 2000 March Monthly Report the LaRouche Committee had received an election cycle contribution total of \$2,382,974,

¹⁰ In contrast, Vice-President Gore received 50% of the vote and Senator Bradley received 46%.

21-04-402-3120

while the Gore campaign had reported receiving \$30,574,404 and the Bradley campaign had reported receiving \$29,434,191. Further, and according to an article published on the Sacramento Bee website on December 16, 1999, a Field poll of likely Democratic voters taken in California in October, 1999 resulted in 45% for Vice-President Gore, 17% for Senator Bradley, and 38% undecided, while another Field poll in California taken in December resulted in 44% for Vice-President Gore, 17% for Senator Bradley and 39% undecided; in neither was Mr. LaRouche mentioned.

As was true with the earlier debates discussed above, it appears that the invitations to Vice-President Gore and Senator Bradley to take part in the March 1 debate in California were extended as early as October, 1999.¹¹ No information is in hand with regard to any later consideration given to other candidates. However, as of the date of the initial invitations, Lyndon LaRouche was apparently in Germany and had not campaigned in California. By the end of September, 1999, the LaRouche Committee had actually allocated more to California than had the Bradley campaign; however, the totals of contributions received nationwide were much greater for Senator Bradley than they were for Mr. LaRouche, and, by the date of the California debate, the totals of California allocations and of total contributions received differed widely between the Gore and Bradley campaign on one hand and the LaRouche campaign on the other. Further,

¹¹ According to an article in the October 13, 1999, edition of the Los Angeles Times, Vice-President Gore and Senator Bradley had already agreed to take part in the March 1, 2000, debate, indicating that their invitations had been received before October 13. Only three Democratic candidates later appeared on the California ballot: Vice-President Al Gore, Senator Bill Bradley, and Lyndon LaRouche.

by the date of the debate Mr. LaRouche had garnered less than 1% of the primary vote in New Hampshire. There is also no evidence in the complaint that Mr. LaRouche was excluded from this debate because of his views.

The assertions by CNN that the staging media organizations had pre-established criteria for selecting debate participants, the objectivity of those criteria and their apparent application to the candidate invitation process, including the actual levels of campaign activity of the respective candidates both at the time of the issuance of invitations and at the time of the March 1 debate, support the organizations' decisions not to include Mr. LaRouche. Therefore, this Office recommends that the Commission find no reason to believe the Los Angeles Times and Cable Network News violated 2 U.S.C. § 441b. This Office also recommends, for the reasons cited in the previous two matters, that the Commission find no reason to believe that Gore 2000, Inc., and Jose Villarreal, as treasurer, and Bill Bradley for President, Inc., and Theodore V. Wells, Jr., as treasurer, violated 2 U.S.C. § 441b.

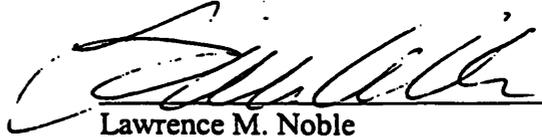
IV. RECOMMENDATIONS

1. Find no reason to believe in MUR 4956 that the Union Leader Corporation, New Hampshire Public Television, New England Cable News, Gore 2000, Inc., and Jose Villarreal, as treasurer, and Bill Bradley for President, Inc., and Theodore V. Wells, Jr., as treasurer, violated 2 U.S.C. § 441b.
2. Find no reason to believe in MUR 4962 that WMUR-TV, Cable News Network, Gore 2000, Inc., and Jose Villarreal, as treasurer, and Bill Bradley for President, Inc., and Theodore V. Wells, Jr., as treasurer, violated 2 U.S.C. § 441b.
3. Find no reason to believe in MUR 4963 that the Los Angeles Times, Cable News Network, Gore 2000, Inc., and Jose Villarreal, as treasurer, and Bill Bradley for President, Inc., and Theodore V. Wells, Jr., as treasurer, violated 2 U.S.C. § 441b.
4. Approve the appropriate letters.

5. Close the files in these matters.

10/25/00

Date



Lawrence M. Noble
General Counsel

Staff Assigned: Anne A. Weissenborn

21.04.402.3123



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary
FROM: Office of General Counsel
DATE: October 25, 2000
SUBJECT: MUR 4956,4962,4963-First General Counsel's Report

KCS

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

DISTRIBUTION

SENSITIVE
NON-SENSITIVE
72 Hour TALLY VOTE
24 Hour TALLY VOTE
24 Hour NO OBJECTION
INFORMATION

COMPLIANCE
Open/Closed Letters
MUR
DSP
STATUS SHEETS
Enforcement
Litigation
PFESP
RATING SHEETS
AUDIT MATTERS
LITIGATION
ADVISORY OPINIONS
REGULATIONS
OTHER

21.04.402.3124



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Lawrence M. Noble
General Counsel

FROM: Mary W. Dove/Lisa R. Davis
Acting Commission Secretary 

DATE: October 31, 2000

SUBJECT: MURs 4956, 4962, & 4963 - First General Counsel's Report
dated October 25, 2000.

The above-captioned document was circulated to the Commission
on Thursday, October 26, 2000

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

- Commissioner Mason —
- Commissioner McDonald XXX
- Commissioner Sandstrom —
- Commissioner Smith —
- Commissioner Thomas —
- Commissioner Wold —

This matter will be placed on the meeting agenda for

Tuesday, November 7, 2000.

Please notify us who will represent your Division before the Commission on this
matter.

2000 OCT 31 10 31 AM